

PROCEDURES FOR H-2B TEMPORARY LABOR CERTIFICATION IN NONAGRICULTURAL OCCUPATIONS

OVERVIEW

An H-2B temporary nonagricultural worker is an alien who is coming temporarily to the U.S. to perform temporary services or labor if qualified U.S. workers capable of performing such services or labor are not available, and whose employment will not adversely affect the wages and working conditions of similarly employed U.S. workers.

Immigration and Naturalization Service (INS) regulations at 8 CFR 214.2(h)(6) establish requirements for the H-2B visa classification. INS regulations require: (1) that the H-2b petitioner be a U.S. employer, or the authorized representative of a foreign employer having a location in the United States; and (2) that the employer apply for temporary labor certification with the Department of Labor (DOL) prior to filing a petition with the INS to classify an alien as an H-2B worker in all areas of the United States, except the Territory of Guam.

A temporary labor certification is advice from the Secretary of Labor to INS on whether or not U.S. workers capable of performing the temporary services or labor are available and whether or not the alien's employment will adversely affect the wages and working conditions of similarly employed U.S. workers. *The INS is not bound by DOL's certification or notice that certification cannot be made.*

STANDARDS FOR DETERMINING THE TEMPORARY NATURE OF A JOB UNDER H-2B

A job opportunity is temporary under the H-2B classification if the employer's need for the duties to be performed is temporary, whether or not the underlying job is permanent or temporary. As a general rule, the period of the employer's need must be 10 months or less, although there may be extraordinary circumstances where the need may be for longer than a year. If there are unforeseen circumstances where the employer's need exceeds 10 months, a new certification is required for each period beyond 10 months.

Temporary employment should not be confused with part-time employment, which does not qualify for temporary (or permanent) labor certification.

The employer's need for the services or labor shall be either: (1) one-time occurrence; (2) a seasonal need; (3) a peakload need; or (4) an intermittent need.

One time occurrence: The employer must establish: (1) that it has not employed workers to perform the services or labor in the past; and (2) that it will not need workers to perform the services or labor in the future, or that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

Seasonal Need: The employer must establish that the service or labor is traditionally tied to a season of the year by an event or pattern and is of a recurring nature. The employer must specify the period(s) of time during each year in which it does not need the services or labor. The employment is not seasonal if the period during which the services or labor is needed is unpredictable, subject to change, or considered a vacation period for the employer's permanent employees.

Peakload Need: The employer must establish that it regularly employs permanent workers to perform the services or labor at the place of employment and it needs to supplement its permanent staff on a temporary basis due to a seasonal or short-term demand with temporary employees who will not become a part of the regular operation.

Intermittent Need: The employer must establish that it has not employed permanent or full time workers to perform the services or labor, but occasionally or intermittently needs temporary workers for short periods.

FILING INSTRUCTIONS

Every temporary application shall include:

1. Two original Form ETA 750, Part A, the offer of employment portion of the Application for Alien Employment Certification form signed by the employer. Part B, Statement of the Qualifications of the Alien is not required.
2. Documentation of any efforts to recruit U.S. workers the employer may have made before filing the application.
3. A statement explaining why the job opportunity is temporary and why the employer's need for the work to be done meets the standard of either a one time occurrence, a seasonal need, a peakload need, or an intermittent need. This should be submitted separately on company letterhead with signature.

To allow for enough recruitment of U.S. workers and enough processing time by State and Regional Offices, the State Workforce Agency (SWA) shall advise employers to file requests for temporary labor certification at least 60 days before the labor certification is needed in order to receive a timely determination. Applications received more than 120 days before the worker is needed will be returned to the employer.

More than one alien may be requested on an application if they are to do the same type of work on the same terms and conditions, in the same occupation, in the same area(s) of employment during the same period. The number requested may not exceed the actual number of job openings. The number of openings the employer intends to fill must also be specified in the advertisement and the job order required in Section IV of these instructions.

PROCESS OF H2B FILING

- Review the application for completeness

- Advise employer in writing of deficiencies and/or corrections or if no corrections
- Advise employer in writing to begin advertising
 - SWA enters 10 day job order
 - Employer runs 3 consecutive day newspaper advertisement in conjunction with SWA job order
- Advise employer in writing of wrap-up procedures
- SWA has 30 days to complete this process prior to transmittal to U.S. DOL.
- After transmittal U.S. DOL has 30 days to make final determination.